IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.532 OF 1986

Indian Bank ...Appellant
Vs.
Aelora Construction Company & Anr. ...Respondents

Mr Rishabh Shah i/by Matubhai Jamietram & Madan for the Appellant.
Mr Mohan Pungalia for the Respondent No.1.
None for the Respondent No.2.

CORAM : ABHAY S. OKA, J.

DATE : APRIL 12, 2006.

JUDGMENT:

1. I have extensively heard the submissions of the learned Counsel appearing for the Appellant (the Second Defendant) and the learned Counsel appearing for the Respondent No.1 (the Plaintiff). None appears for the Respondent No.2 (the first Defendant). The Appellant has taken exception to the judgment and decree dated 31st March, 1986 passed by the learned 6th Joint Civil Judge, Senior Division, Pune in Special Civil Suit No.516 of 1982. By the said judgment and decree, the Appellant and the Respondent No.2 were jointly and severally directed to pay an amount of Rs.2,73,507.61/- to the Respondent No.1 together with interest thereon at the rate of 18 per cent per annum on the principal amount of Rs.1,75,105.15/-. The decree of declaration was also

passed declaring that there is a concluded contract between the Respondent No.1 and the Respondent No.2 for construction of a factory building at village Kharadi, Taluka Haveli, District Pune. A declaration was granted declaring that the Respondent No.1 has the first charge or lien on the properties of the Respondent No.2. It was directed that if the Respondent No.1 fails to pay the decretal amount then the Plaintiffs are entitled to sell the factory building and office premises of the Respondent No.2 and to appropriate the sale proceeds towards the dues of the Respondent No.1.

2. With a view to appreciate the submissions made by the learned Counsel appearing for the parties, it will be necessary to refer to the facts of the case in brief. For the sake of convenience the parties are hereinafter referred to with reference to their status in the Trial Court.

3. The case of the Plaintiffs is that on 07th February, 1976 an agreement was executed by and between the Plaintiffs and the first Defendant by which the Plaintiffs agreed to construct a factory premises of the first Defendant on the terms and conditions recorded in the said agreement. The

Plaintiffs carried out the work of construction to the satisfaction of the first Defendant. However, the first Defendant represented to the Plaintiffs that they were facing financial difficulties and as such they were not in a position to discharge their liability to the extent of Rs.01,34,866.87.15/- paise which was the sum due and payable under the said agreement to the Plaintiffs. The first Defendant-Company requested the Plaintiffs to handover the possession of the constructed factory to enable the first Defendant to install machinery. The first Defendant confirmed that they would discharge their liability by monthly instalments of Rs.30,000/- commencing from 01st August, 1977 and that the first Defendant would issue irrevocable instructions to the second Defendant-Bank to make payment of the said instalments to the Plaintiffs from the bill discounting account of the first Defendant maintained with the second Defendant. According to the Plaintiffs, the second Defendant also confirmed that they were agreeable to pay the instalments as aforesaid on behalf of the first Defendant on funds becoming available in the account of the first Defendant. According to the case of the Plaintiffs relying upon the aforesaid representations they entered into one more agreement with the first

Defendant on 20th May, 1977 recording the aforesaid terms and conditions. The second Defendant confirmed their obligation to pay instalments in writing by letter dated 25th May, 1977 which was written by them to the first Defendant. Case of the Plaintiffs is that only because the second Defendant confirmed their liability to make payment in writing from the account of the first Defendant, the Plaintiffs agreed to accept the arrangement. According to the case of the Plaintiffs, on 09th March, 1979 the second Defendant paid a sum of Rs.50,000/- to the Plaintiffs at the instance of the first Defendant. By the letter dated 10th March, 1981 first Defendant confirmed that according to their books of account there was a credit balance of Rs.95,000/- to the Plaintiff's account towards the various bills for construction of factory premises and further sum of Rs.25,000/- was payable by the first Defendant to the Plaintiffs being security deposit amount lying with them. According to the Plaintiffs, the Defendants failed to perform their obligation and therefore, a notice was issued to the Defendants. As the Defendants failed to comply with requisitions in the notice, suit for declaration and other reliefs was filed by the Plaintiffs.

4. The second Defendant filed written statement

contesting the suit filed by the Plaintiffs. The basic contention of the second Defendant is that the letter dated 25th May, 1977 was written by the second Defendant to the first Defendant merely acknowledging the instructions of the first Defendant and it was specifically mentioned in the letter that the instructions would be carried out only if sufficient funds were available in the account of the first Defendant. The second Defendant denied that there was any concluded agreement between the Plaintiffs and the second Defendant. The second Defendant denied that any assurance was given to the Plaintiffs in response to the claim of the Plaintiffs against the first Defendant. It is submitted that confirmation of instructions given by the first Defendant to the second Defendant by writing a letter does not confer any right on the Plaintiffs who are the third parties. In substance it is submitted that there is no concluded contract between the Plaintiffs and the second Defendant.

5. The first Defendant also opposed the suit by filing written statement. A contention was raised that the Plaintiffs have left the work incomplete and in fact the first Defendants are entitled to damages from the Plaintiffs.

6. The learned Trial Judge framed various issues. The learned Trial Judge held that there was a privity of contract between the Plaintiffs and the second Defendant. The learned Trial Judge held that the letter dated 25th May, 1977 send by the second Defendant to the first Defendant is a letter of guarantee issued by the second Defendant on behalf of the first Defendant and in fact the second Defendant acted upon the guarantee and therefore, the second Defendant cannot escape from its liability. The learned Trial Judge held that there was sufficient balance in the account of the first Defendant in March 1979 from which the second Defendant could have paid the necessary instalments to the Plaintiffs. The learned Judge held that there was a privity of contract between the Plaintiffs on one hand and first and second Defendant on the other hand and the second Defendant was liable to pay dues of the first Defendant.

7. The learned Counsel appearing for the Appellant-second Defendant submitted that there is absolutely no privity of contract between the second Defendant and the Plaintiffs. He submitted that it is not even the case of the Plaintiffs that there was an

Agreement of Guarantee executed by the second Defendant and therefore, a finding to that effect recorded by the Trial Court is completely erroneous. The learned Counsel invited my attention to the correspondence made between parties and the notes of evidence on record. He submitted that merely because certain standing instructions were issued by the first Defendant to its banker i.e. the second Defendant bank, no privity of contract is created between the Plaintiffs and the second Defendant and the privity of contract is between the Plaintiffs and the first Defendant.

8. The learned Counsel appearing for the Plaintiffs relied upon clause (d) of section 2 of the Indian Contract Act, 1872. He submitted that there was a clear promissory estoppel operating against the second Defendant. Relying upon relevant commentary, he submitted that doctrine of promissory estoppel is a departure from the doctrine of consideration. He submitted that under the law of contract, the promisee may provide consideration by conferring a benefit on a third party on a promisor’s request. He submitted that on plain reading of the correspondence made between the parties, privity contract between the Plaintiffs and second Defendant is established. He

submitted that but for the assurance of the second Defendant, the Plaintiffs would not have entered into second agreement with the first Defendant. He invited my attention to the relevant part of the pleadings and oral evidence on record.

9. I have considered the submissions. So far as the first agreement dated 07th February, 1976 between the first and second Defendant is concerned, it is admitted position that the second Defendant is not at all concerned with the said agreement. The entire emphasis of the case of the Plaintiffs is on letter dated 25th May, 1977 send by the second Defendant to the first Defendant and a copy of which was endorsed to the Plaintiffs. The said letter is at Exhibit 66 which reads thus:

> M/s Micro Piston & Rings Limited,
> Off Pune Ahmednagar Road,
> 8/2 Kharadi,
> PUNE 411 014.
>
> Dear Sir,
>
> Re: Repayment of outstanding dues
> to your Building constructions.
>
> "With reference to your letter No.FA/IB/2214 dated 23rd May, 1977, instructing us to pay Rs.30,000/- (Rs. Thirty Thousand Only) per month effective from 01st August, 1977, to Aelora Construction Co. Pune 2, from you O.C.C. Account with us, we may state that we

are agreeable to remit the instalments provided enough funds are available in your account at that time.

Please also note that our Bank has registered our charge on land, Building and Machinery, of your company at Kharadi, Pune and as such no other Company can have the charge without our consent."

Yours faithfully

(P.N. PAI)
MANAGER

cc: M/s Aelora Construction Co.
847 Raviwar Peth
POONA 411 002."

If the said letter is read as it is, the first paragraph of the said letter records the confirmation of instructions given by the first Defendant by letter dated 23rd May, 1977 to the second Defendant to pay a sum of Rs.30,000/- per month to the Plaintiffs from O.C.C. account of the first Defendant with the second Defendant. It is stated that the second Defendant was agreeable to remit the instalments provided enough funds were available in the account of the first Defendant. The second Defendant also informed the first Defendant that there was already a charge created in favour of the second Defendant on the immovable property and machinery of the first Defendant and therefore, any additional charge in favour of the Plaintiffs cannot be created without the consent of the second Defendant. The said letter by

itself does not spell out any privity of contract between the Plaintiffs and the second Defendant. It is necessary to refer to letter dated 21st August, 1978 send by the Plaintiffs to the second Defendant. The said letter is exhibited as Exhibit 51. In the first paragraph of the said letter, the Plaintiffs have stated thus:

> "It is a very unfortunate to note that during this last one year the singal instalment could not be transferred to our account, of course due to non availability of funds and balance in their account. During last one year so have been trying very hard to get payment but we have not received any amount."

In the second last paragraph Plaintiffs have stated as under:

> . "In this connection we are contacting Managing Director of Micro Piston & Rings Ltd. on many occasions who has of course given us assurance to clear our bill for which he is trying very hard. In last week we have had meeting with him when we had put forward to him our difficult situation. He has of course realised the same and has pointed out that he

> has asked for some finance against building constructed by us and has also assured us that this proposal will be thro' by you positively within very short time. Since our Bankers are also pressing very hard for this amount he shall be highly obliged if you can intimate the position to us or our Bankers directly. We also request you to kindly sanction the additional loan and transfer our full amount Rs.1,88,500/- excluding interest as per agreement, to our account immediately."

From the tenor of the said letter it is obvious that at the relevant time even the Plaintiffs have not alleged that there was a concluded contract between them and the second Defendant or that the second Defendant was a guarantor of the first Defendant. In letter dated 05th March, 1979 which is at Exhibit 54 the Plaintiffs have informed the second Defendants as under:

> "Your kind attention is now invited to your letter No.Adv of 25-5-77 under which you have given your consent to transfer amount to our account from the account of M/s Micro Piston and Rings Ltd. Hence we now kindly request you to transfer the amount to our account from

> the limit you have now sanctioned to them. Your most kind co-operation in this regard will be of great help to us. As you are fully aware that because of blockage of funds for very long period our business has been paralysed. Therefore your most urgent action and kind help as per your letter of 25-5-77 will be of great to us."

The letter dated 19th June, 1978 at Exhibit 50 send by the Plaintiffs to the second Defendant is very important. In the said letter it was stated that the Plaintiffs were soliciting valued co-operation from the second Defendant by transferring necessary amount to the account of the Plaintiffs. It was stated that the Plaintiffs were ready to accept any amount more than Rs.10,000/-. There is a letter at Exhibit 94 dated 09th March, 1979 send by Shri Hasmukh Shah who has made earlier correspondence with the second Defendant on behalf of the Plaintiffs. This letter appears to be in response to the reaction expressed by Shri Pai who was then the Manager of the concerned branch of the second Defendant at the relevant time to the letter dated 05th March, 1979 (Exhibit 54) send by the Plaintiffs to the second Defendant. Shri Hasmukh Shah has stated in said letter at Exhibit 94 as under:

> "I am very much to see that you are purturbed by my letter I would like to make it very clear that I had no other intention but to make it known to you about exact balance. **I have not tried to create any record since this record will be reduntant since I have to take money from Micro-Piston and not from you.** I once again request you not to create any misunderstanding for me. I hope to be favoured with your kind co-operation in future also. Thanking you once again."

In this letter the said partner of the Plaintiffs has categorically stated that the Plaintiffs have to recover money from the first Defendant and not from the second Defendant.

10. One Ashok Shah, a partner of the Plaintiffs entered the witness box on behalf of the Plaintiffs. The said witness was confronted by the said letter at Exhibit 94 send by Shri Hasmukh Shah to Shri Pai. The said witness while referring to the letter dated 09th March, 1979 at Exhibit 94 stated thus:

> "It is true that I addressed the letter

dt.9/3/79. It is true that in this letter I wrote to the Manager that I had to recover the dues from the defendant No.1 and not from the Manager Shri Pai personally. It was my personal letter to Shri Pai the Manager. There was no personal transaction between myself and Shri Pai any time. The relations between myself and Shri Pai were on account of him capacity as the bank manager. It is not true to say that now I am falsely deposing that the letter Exh.94 was a personal letter addressed to Shri Pai in his personal capacity. It is not true to say that I was only demanding the co-operation from the defendant No.2 in all my correspondence. I was demanding my dues from the defendant No.2 also as of right."

11. It is pertinent to note that Shri Pai was examined as a witness by the second Defendant. In his cross-examination the Advocate for the Plaintiffs have not given him any suggestion that the letter at Exhibit 94 was written to him in his personal capacity and not in his capacity as the manager. The learned Counsel appearing for the Plaintiffs made a grievance that the letter dated 23rd May, 1977 which was send by

the first Defendant to the second Defendant which is referred to in letter dated 25th May, 1977 (Exhibit 66) was not produced though Shri Pai admitted that the letter was in custody of the bank. In my view, there is no substance in the said grievance. The question which is required to be considered in this Appeal is whether there is a privity of contract between the Plaintiffs and the second Defendant and therefore, non-production of the said letter may not have any relevance at all.

12. A reference will have to be made to notice dated 30th April, 1981 at Exhibit 60 send by the Advocate for the Plaintiffs to the first Defendant. In the said notice, there is not even a reference to any contractual relationship between the Plaintiffs and second Defendant or to any guarantee allegedly issued by the second Defendant. The only averment made in the said notice is that the second Defendant has expressed its inability to pay any further amount on behalf of the first Defendant. No notice was sent on 30th April, 1981 to the second Defendant and even a copy of the said notice was not forwarded to the second Defendant. For the first time, a notice was issued to the second Defendant by the original Plaintiffs on 14th November, 1981. The said notice

proceeds on the footing that the Plaintiffs have reliably learnt that the second Defendant was going to sanction additional credit of Rs.2,00,000/- to the first Defendant. In the said notice, there is a vague allegation that second Defendant has committed breach of agreement and breach of trust. By the said notice, the Plaintiffs called upon the second Defendant to pay the outstanding dues of the first Defendant. The said notice was replied to by the Advocate for the second Defendant by pointing out that there was no contractual relationship between the parties.

13. In the examination-in-chief of Shri Ashok Shah on behalf of the Plaintiffs has stated that if no assurance was given by the second Defendant to pay on behalf of the first Defendant, he would not have handed over the possession of the premises to the first Defendant. In the entire examination-in-chief there is no allegation that second Defendant guaranteed payment of the amount by the first Defendant.

14. Coming back to the finding recorded by the Trial Court in paragraph No.14 which reads thus:

"I am satisfied by the arguments of Shri Saraf

> in this respect. **Thus it is clear that the letter dated 25.7.77 is a letter of guarantee issued by the defendant No.2 on behalf of the defendant No.1 and the defendant No.2 also acted upon this guarantee and therefore now the defendant No.2 can not escape from their liability."**(Emphasis supplied)

In paragraph No.17, the Trial Court has recorded following findings:

> "From the correspondence before me and after going through the specific agreements between the plaintiffs and defendant No.1. I am satisfied that the plaintiffs would not have given the possession of the premises to the defendant No.1. If the defendant No.2 would not have written the letter dated 25.5.1977. The plaintiff in his deposition dosed that he already handed over the constructed premises to the defendant No.1 on the basis of the said letter."

In paragraph No.43 the Trial Court proceeded to record following finding:

> "Considering the record and evidence before me and after hearing of arguments of both the advocates I have come to the conclusion that there was privity of contract between the plaintiffs and defendant Nos.1 and 2 and defendant No.2 is equally liable to pay the dues of the plaintiffs. Therefore, my finding for issue No.1 is in the affirmative."

It must be noted here that it is not at all case of the Plaintiffs that the second Defendant guaranteed the payment of the amount due and payable by the first Defendant under the agreement between the Plaintiffs and the first Defendant. There is neither such pleading nor such evidence led by the Plaintiffs. Therefore, that finding is liable to be set aside. As stated earlier there is a finding recorded in paragraph No.17 that there was a contractual relationship between the Plaintiffs and the second Defendant. Except for reference to contract of guarantee in paragraph No.14 of the judgment, there is no clear finding recorded by the Trial Court regarding nature of the alleged contract between the Plaintiffs and the second Defendant. There is absolutely no evidence on record to show that there is a concluded contract between the Plaintiffs and the second

Defendant. The correspondence made by the Plaintiffs with the second Defendant-Bank which is already referred to above clearly shows that any time before sending the notice through Advocate, the Plaintiffs never pleaded existence of any privity of contract between them and second Defendant or never claimed that the second Defendant was a guarantor. There is nothing on record to show that only on the basis of letter dated 25th May, 1977 the Plaintiffs executed supplementary agreement with the first Defendant. It is pertinent to note that the second agreement between the Plaintiffs and the first Defendant has been executed on 20th May, 1977 i.e. five days before the letter at Exhibit 66 dated 25th May, 1977 was send by the second Defendant to the first Defendant. Thus, the case made out that the second contract was executed on the basis of assurance recorded in the letter at Exhibit 66 deserves outright rejection.

15. Perusal of the letter at Exhibit 66 and other correspondence shows that the first defendant gave standing instructions to the second Defendant to pay certain amounts from the account of the first Defendant to the Plaintiffs. The letter at Exhibit 66 is an acceptance and confirmation by the second Defendant of the instructions issued by the first

Defendant. All that this correspondence proves is that certain instructions were given by the first Defendant to its bankers i.e. the second Defendant and there is confirmation of the said instructions by the second Defendant. This is nothing but a regular correspondence between a banker and its customer. The said letter cannot create a contractual obligation in favour of the Plaintiffs. The said letter can be termed neither as a contract between the Plaintiffs and the second Defendant nor a guarantee executed by the second Defendant in favour of the Plaintiffs. Apart from the fact that there are no pleadings regarding existence of guarantee, on plain reading of the document it can never be construed as a guarantee.

16. Thus, the view taken by the Trial Court about the existence of privity of contract between the Plaintiffs and second Defendant is completely contrary to the evidence on record. As the Plaintiffs have failed to prove the contractual relationship between them and the second Defendant, the decree which is passed as against the second Defendant deserves to be quashed and set aside.

17. Hence, I pass the following order:

O R D E R

i) The impugned Judgment and Decree in so far as it operates against the second Defendant is quashed and set aside and the suit is dismissed as against the second Defendant. However, rest of the decree passed against the first Defendant is maintained as it is.

ii) There will be no orders as to costs.

JUDGE